(2)

No. 06-1383

FILED
MAY 4 - 2007
CLERK

In The

Supreme Court of the United States

NUCOR CORPORATION,
CASEY EQUIPMENT CORPORATION, and
GADSDEN INDUSTRIAL PARK, LLC,

Petitioners,

v.

GULF STATES REORGANIZATION GROUP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP CLARK JONES
BELL, BOYD & LLOYD, LLP
1615 L Street, NW, Suite 1200
Washington, D.C. 20036
(202) 466-6300

Attorney for Respondent

May 4, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether the standards recently enunciated by this Court under the Sherman Act for "predatory bidding" are pertinent in any way to a case asserting an entirely different type of antitrust action, involving conduct by a monopolist which was carried out with the intent and effect of blocking a new entrant to the relevant market.

2. Whether the Court of Appeals' holding – that a prospective new competitor which was excluded by a monopolist from the relevant market had standing to sue under the Sherman Act, and suffered antitrust injury – was consistent with existing Supreme Court and other Circuit Court precedent.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption sets forth all the parties to this case.

The respondent corporation has no parent company. No publicly held company owns ten percent or more of respondent's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
JURISDICTION	1
STATEMENT OF THE CASE	1
ARGUMENTS FOR DENYING THE PETITION	3
I. THE ISSUES RAISED IN THIS MATTER HAVE NO RESEMBLANCE TO THOSE DECIDED IN THE *WEYERHAEUSER* CASE	3
II. THE COURT OF APPEALS' OPINION IS FULLY CONSISTENT WITH WELL-ESTABLISHED PRECEDENT ON STANDING AND ANTITRUST INJURY	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 4

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 7

In re First Data Corporation, 1994 FTC Lexis 149 (1994) 5

United States v. Sungard Data Systems, 172 F. Supp.2d 172 (D.D.C. 2001) 5

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007) 3, 4, 5, 6

Winn Dixie Stores, 66 Federal Register 3602 (January 16, 2001) 5

STATUTES

28 U.S.C. § 1254(1) 1

TREATISES AND ARTICLES

Areeda, Hovenkamp and Solow, IV (Rev. Ed.) Antitrust Law, at § 952b, p. 25 4

Spears, Federal Merger Enforcement in Bankruptcy, *Antitrust* (ABA, Spring 1992, at 19) 5

JURISDICTION

The opinion and judgment of the court of appeals was entered on October 5, 2006, and a timely petition for panel rehearing and rehearing en banc was denied January 17, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an antitrust action, asserting concerted action in restraint of trade in violation of Section 1 of the Sherman Act, and monopolization, attempted monopolization and conspiracy to monopolize in violation of Section 2 of the Sherman Act.

The relevant product market asserted by the plaintiff is "hot rolled coil," a form of thin steel used in various types of manufacturing. The relevant geographical market is the Southeastern United States. Petitioners' Appendix, at 1a-2a (hereafter, Pet. App. ___).

The principal defendant, Nucor Corporation ("Nucor"), is the dominant producer of hot rolled coil in the Southeastern United States. Pet. App. 2a.

The plaintiff, Gulf States Steel Reorganization Group, Inc. ("the Group"), was formed by a number of steel industry executives for the purpose of buying out of bankruptcy and reopening the steel mill operated by the former Gulf States Steel, Inc. of Alabama ("Gulf States Steel"). The primary product that the Group planned to manufacture was hot rolled coil, in direct competition with Nucor. Pet. App. 2a.

Both Gulf States Steel itself and the company's bankruptcy trustee engaged in extensive efforts to sell its assets, without success. Thereafter, the trustee entered into a contract to sell Gulf States Steel's land and primary steel-producing equipment to the Group, subject to bankruptcy court approval. Pet. App. 2a.

Upon reading of the impending sale in the trade press, Nucor's Executive Vice President contacted a steel industry equipment dealer, co-defendant Casey Equipment Corporation ("Casey"). A contract was formed pursuant to which an entity formed by Casey, Gadsden Industrial Park, LLC ("Park"), would buy the steel-producing assets at issue with money provided by Nucor. Nucor had a unilateral right to reject any resale by Casey to a domestic buyer, but a more limited right with respect to foreign ones. Pet. App. 3a.

Nucor's affiliate (Park), with Nucor's money, succeeded in outbidding the Group at the bankruptcy auction that Nucor's intervention triggered, and later re-sold the assets at a profit to buyers located in Asia. Pet. App. 3a.

The fundamental dispute between the parties before the trial court was the relevant market in which to evaluate the impact of the actions of Nucor and its affiliates. Nucor posited that the proper market in which to evaluate its conduct was not the relevant market asserted in plaintiff's Complaint (production of hot rolled coil), but rather a purported market for steel mill assets.[1] Nucor's

[1] Although the case was resolved by the District Court on a motion for summary judgment, that motion was in reality a rehearing of the issues raised in defendants' Motion to Dismiss. The only discovery to date has concerned the threshold issues of standing and antitrust injury.

fundamental argument – which the District Court accepted and the Court of Appeals overruled – was that Nucor's intervention increased competition *at the bankruptcy auction.*

When this case is evaluated in the context of the market for hot rolled coil, the effect on competition is readily apparent. Without Gulf States, Nucor's only competition in the Southeastern United States was a single steel mill in Kentucky. The Group's plans raised the specter of a low-cost hot rolled coil producer in Nucor's back yard.

The Court of Appeals, after evaluating the facts presented in the context of the market for hot rolled coil, reversed the trial court's grant of summary judgment in favor of Nucor and its affiliates, holding that the Group had standing to sue, and had properly asserted antitrust injury.

ARGUMENTS FOR DENYING THE PETITION

I. THE ISSUES RAISED IN THIS MATTER HAVE NO RESEMBLANCE TO THOSE RAISED IN THE *WEYERHAEUSER* CASE

As Judge Cudahy noted in his concurring opinion below, "[t]his case is about suppression of potential competition by a monopolist – the very essence of anti-competitive conduct." Pet. App. 14a. In evaluating the case in the context of competition in the market for production of hot rolled coil, it becomes readily apparent that in arranging for the purchase and re-sale overseas of the steel-producing equipment that the Group needed to enter the market, Nucor received something that had far more

value to it than merely the profit on the sale: the ability to continue to operate free of effective competition in the Southeastern United States. Professor Areeda referred to that intangible as constituting an "anticompetitive premium" – the value of forestalling competition that results from an acquisition by a dominant firm. *See* Areeda, Hovenkamp and Solow, IV (Rev. Ed.) Antitrust Law, at § 952b, p. 251.

The primary basis for Nucor's assertion that a writ of certiorari should issue in this case is its contention that the issues raised are similar to those decided in this Court's recent decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). There is simply no substance to that contention. *Weyerhaeuser* involved allegations of "predatory bidding," – a rare phenomenon involving exercise of monopsony power to bid up the price of manufacturing inputs in order to put those inputs beyond the reach of competitors in the buying market. Predatory bidding, much like predatory (below cost) pricing, creates a particularly challenging problem for the judiciary. The case law in this area implicitly recognizes that any scheme that has as its object the destruction of competitors can constitute a Sherman Act violation. The challenge involving cases where liability rests on alleged anticompetitive pricing is to set the proof requirements high enough so as to penalize anticompetitive conduct while at the same time not discouraging vigorous price competition on the merits. This Court accomplished just that in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) with respect to predatory pricing, and established similarly stringent proof requirements with respect to predatory bidding in *Weyerhaeuser*.

Predatory bidding was not alleged by the plaintiff in this matter, and the antitrust principles applicable to this case are far removed from those decided in *Weyerhaeuser.*

Counsel for Nucor has cobbled together an argument that posits steel mill equipment auctions as an "upstream" market to the production of steel itself. From this shaky foundation – there being absolutely nothing in the record of this case establishing the existence of an "upstream / downstream" relationship between bankruptcy auctions and steel production – Nucor argues that competition at bankruptcy auctions[2] will be enhanced by denying excluded competitors relief under the antitrust laws. This is nothing more than a re-hash of the argument rejected by the Court of Appeals that this case should be analyzed in the context of the market for steel mill assets, instead of the market for production of hot rolled coil. *See* Pet. App. 11a, where the Court of Appeals overrules the District Court's finding that there was full and fair competition at the bankruptcy auction, noting that in cases alleging an anticompetitive asset acquisition, the propriety of the acquisition is measured by the impact on the relevant market, not the level of competition for the acquisition.

---

[2] While antitrust issues are relatively rare in bankruptcy cases, neither the Justice Department not the Federal Trade Commission have hesitated to assert their jurisdiction over the parties to a bankruptcy auction in appropriate situations. *See, e.g., United States v. Sungard Data Systems,* 172 F. Supp.2d 172, 178-79 (D.D.C. 2001); *In re First Data Corporation,* 1994 FTC Lexis 149 (1994); *Winn Dixie Stores,* 66 Federal Register 3602 (January 16, 2001) (Proposed FTC Consent Order involving purchase of bankruptcy assets). *See also,* Spears, Federal Merger Enforcement in Bankruptcy, *Antitrust* (ABA, Spring 1992, at 19).

When the case is analyzed in its proper context, it becomes readily apparent that there is no conflict between the Court of Appeals' decision and this Court's decision in *Weyerhaeuser.*

II. THE COURT OF APPEALS' OPINION IS FULLY CONSISTENT WITH WELL-ESTABLISHED PRECEDENT ON STANDING AND ANTITRUST INJURY

By taking certain statements in the Court of Appeals' opinion out of context, and by parsing isolated words and phrases used in the Opinion as if they were statutes subject to interpretation, Nucor and its co-petitioners assert conflicts with established Supreme Court precedent, and conflicts among the Circuits, that are more imaginary than real.

First, Nucor erroneously contends that the Court of Appeals limited its analysis of the causation issue to only Article III standing, and ignored the more stringent test applicable to standing under § 4 of the Clayton Act. All of Nucor's legal arguments are founded on this erroneous premise. There is simply no substance to this contention. At part II.A of the Court of Appeals' opinion, after reviewing plaintiff's contentions, the court notes that "[t]hese assertions state a clear causal connection between the plaintiff's injury and the defendants' conduct." Pet. App. 5a. While it is true that later on in that same paragraph the Opinion states that "it is clear that the Group would have purchased the assets *but for* the Appellees' participation in the auction," even further on, at footnote 6 (Pet. App. 12a), the Opinion states that "we have held that the Group has shown *proximate cause.*" It is abundantly clear from the context of these statements that the essence of the

Court of Appeals' holding was that the Group had established adequate causation *by any standard.* Nucor is incorrect in its assertion that the Court of Appeals used the wrong standard.

Likewise, Nucor seizes on a statement in the panel opinion's closing remarks dealing with the antitrust injury issue, where it notes that "here the Appellees' [Nucor and its affiliates'] conduct did not *increase* competition in the relevant market." (Pet. App. 12a). The reference to "increased competition" was an obvious rejoinder to Nucor's argument that Nucor's affiliate's bid at the bankruptcy auction had increased competition in the market for steel mill assets. The point made by this section of the Opinion is that it was the effect of Nucor's conduct *on the market for steel production,* not competition at the auction, that mattered for purposes of antitrust analysis.

When the Court of Appeals' opinion is read as a whole, there is no question that the holdings with respect to standing and antitrust injury are fully consistent with this Court's and other Circuit Courts' precedent.[3] Hence there is no basis for this Court to assert its jurisdiction pursuant to Supreme Court Rule 10.

---

[3] For example, at page 23 of Nucor's petition, the argument is made that the Court of Appeals "distinguished" (hence did not follow) this Court's opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977). In fact, the Court of Appeals starts out its analysis of that issue with a discussion of *Brunswick,* then goes on to explain that when this case is analyzed in the context of the proper relevant market, there was readily apparent antitrust injury.

CONCLUSION

For the foregoing reasons, respondent Gulf States Steel Reorganization Group, Inc. respectfully requests that the Court deny the petition of Nucor Corporation and its affiliates for a writ of certiorari.

Respectfully submitted,

PHILIP CLARK JONES
Counsel of Record

BELL, BOYD & LLOYD, LLP
1615 L Street NW, Suite 1200
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondent